In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted]

WORTH MUNN, *et al.*,

Petitioners,

v.

THE HORVITZ COMPANY, *et al.*,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX.

OPINION OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO.

(February 10, 1962.)

DONALD F. LYBARGER, *J.*:

In this action the plaintiffs, the Village of Gates Mills, Ohio, and certain residents thereof, seek to enjoin the defendants from completing construction of a new storm sewer east of S. O. M. Center Road in the City of Mayfield Heights, to the end that it may not discharge water into Deer Creek.

Many of the essential facts on which decision of the case hinges are in dispute. The Court therefore has weighed carefully all of the evidence in the case and therefrom finds the facts to be as set forth below.

In 1925 the County of Cuyahoga constructed along Mayfield Road in what is now the City of Mayfield Heights, a storm sewer (as part of the County storm sewer system) which carries surface water in an easterly direction from Lander Road to a point east of S. O. M. Center where it empties into Deer Creek. For convenience hereafter this will be called the "old sewer" to distinguish it from the new sewer presently under construction as mentioned hereafter. In 1926 a sewer was constructed north from Mayfield Road on Orchard Park Road so that some water runs east and some north at this point.

In 1925-6 a storm sewer was built by the county on S. O. M. Center from a point about 2000 feet south of Mayfield to join unto the old sewer at the intersection of those two roads. In 1938 this sewer was continued north of Mayfield 500 feet and then constructed easterly to discharge into a small branch of Deer Creek. Tributary sewers from neighboring streets flow into all of the trunk line sewers mentioned above.

The area drained by these storm sewers lies in three natural watersheds both north and south of Mayfield, all of which carry water into the Chagrin River at widely separated points. Reference to defendants' exhibit B indicates that the Wilson Mills Creek watershed extends approximately from Lander to Fruitland and Orchard Park (about 2600 feet along Mayfield) and south almost to a new freeway now under construction, then northeasterly from Mayfield.

The Andrews Creek watershed extends westerly from about Fruitland to a line drawn east of the Golden Gate Shopping Center (about 1200 feet along Mayfield Road), southerly between such lines across the freeway to an irregular line south of Alexander Road. It goes across Mayfield in a northeasterly direction.

The natural watershed of Deer Creek extends easterly from the eastern boundaries of the Andrews watershed to a line running north and south of varying distances east of S. O. M. Center. This watershed lies both north and south of Mayfield, going as far south as an irregular line that runs south of Alexander and northeasterly through Acacia Park Cemetery. Approximately 5400 feet of the old sewer on Mayfield lies in this Watershed. About 39% of the total area involved lies in the Wilson Mills and Andrews watersheds, as shown by Defendants' exhibit B.

The effect of the construction of the old sewer and its tributaries is to drain water from south of Mayfield from the three watersheds into Deer Creek. An unspecified amount of water in the sewer west of Orchard Park flows into the Orchard Park sewer discharging into Wilson Mills Creek, but also an unspecified amount of water from the same area continues east in the old sewer into Deer Creek.

At the time when the old sewer along Mayfield was laid the whole surrounding area was sparsely settled.

From 1925 to 1955 there was practically no construction in the vicinity because an injunction of this Court had restrained it due to lack of adequate sewage disposal being available. This restraining order was lifted May 10, 1957. Prior thereto a large shopping center known as Eastgate was built northeast of Mayfield and S. O. M. Center, (40 acres in area) in the Deer Creek watershed; then came Golden Gate Shopping Center at Mayfield and east of Woodrow (17 acres in area) which is actually in the Andrews watershed; and numerous homes have sprung up on eight or ten streets off Mayfield.

Deer Creek, into which the old sewer has discharged surface water since 1925, is a natural watercourse which rises in Mayfield Heights, south of Mayfield, flows northerly and crosses Mayfield, is joined by a branch north of said road, and then runs northeasterly into Gates Mills through a ravine and into the Chagrin River. The ravine is from 10 to 90 feet in depth and the average fall of the creek is 2.3 feet per 100 feet.

Within the ravine of Deer Creek the area is still largely in its natural state. There are many fine trees along the creek—beech, sugar maples, red oaks, tulips, hemlocks, lindens, wild cherry. A count of trees on one side of the creek in a small area alone shows 253 trees over six inches in diameter within 20 feet of the bank. The homes of many of the individual plaintiffs abut on either side of the stream. Gates Mills maintains a culvert on Hillcreek Lane through which the creek flows, and on West Hill Road a high bridge with one footing close to the bank of the stream.

Until 1955 there was no appreciable increase in either the volume or velocity of water discharging into Deer Creek. The old sewer has a rate of discharge of 100 cubic feet per second, and the sewer (under Eastgate) that discharges into the northerly branch of the creek

has a rate of 220 cubic feet per second. Since the construction of Eastgate and other improvements in the last five years, however, there has been a decided increase in the volume of water flowing from Mayfield Heights into the creek. This has resulted in marked erosion, the loss of trees, the washing away of soil and in at least one spot the sinking of the bed of the creek. The Court does not attach too much significance to the damage done by a particularly severe storm in June, 1959 (when a fall of 3.9 inches of rain in 50 minutes was measured in a nearby community) since this was a very unusual storm and the washing out of the Hillcreek culvert most likely was due to the faulty construction of the culvert as well as to the severity of the storm.

Presently the State of Ohio is engaged in the construction of a portion of the North-South Freeway in Mayfield Heights, crossing Mayfield where a large cloverleaf interchange is being built. About sixty acres of the new construction lies south of Mayfield and water from it will drain east on Mayfield into Deer Creek. The old sewer is inadequate to care both for the additional drainage thus imposed by the new freeway and the expansion of home and business areas along Mayfield. These improvements have rendered considerable areas impervious so that they will not now absorb the water as the vacant land did formerly. The amount of water collected on the surface, therefore, is far greater than it was before the improvements were made.

To meet this situation the state has under construction a new sewer running along Mayfield, parallel to the old sewer and emptying into Deer Creek. A small section of the new sewer system lies on the south side of the street, but the main sewer is on the north side of Mayfield with a connection joining the two sections just east of the south-

easterly cloverleaf. A cost analysis, prepared by the engineers in 1960, estimates that at the junction point of the two branches Mayfield Heights is contributing 170 cubic feet per second of drainage water and the freeway 148 cubic feet per second (Plaintiffs' exhibit 34). The new sewer is 72 inches in diameter at the point where it empties into Deer Creek, and its rate of discharge is 320 cubic feet per second.

In addition to the above mentioned sewers Mayfield Heights has under way a 54 inch sewer east of S. O. M. Center and south of Mayfield (in the Deer Creek watershed) which will join the old sewer and have a capacity for discharging 80 cubic feet per second.

When and if all of the sewers flowing into Deer Creek were operating they would have a total capacity to discharge surface water at the rate of 720 cubic feet per second. This compares with a total capacity of discharge from the existing outlets into Deer Creek of 320 cubic feet per second. Obviously the construction of the new sewer is to give additional capacity, since the old sewer is undersized and with the new construction now under way or contemplated it will not be adequate to carry away the increased run-off.

The testimony varies widely as to what is the capacity of Deer Creek. One engineer testified that an average cross section of the creek had a carrying capacity of 255 cubic feet per second and that with the new sewer running at one-half capacity the creek would overflow its banks, as it does even now at times under present conditions. Another expert testified that the capacity of the stream exceeded 600 cubic feet per second and that the new sewer would not bring water into the flood plain. Likewise testimony differs as to the velocity of the creek. One expert said that the velocity will increase as more

water is delivered to the creek; another that the velocity will not be appreciably greater than now, on the theory that the stream has now reached its supercritical flow (*i.e.*, the point at which an increase in volume of water will not increase the velocity).

Weighing the evidence, the Court is satisfied that with the proposed sewer in full operation it will discharge more water into Deer Creek and the flow will frequently exceed the capacity of the stream. The burden imposed by taking water from Wilson Mills and Andrews watersheds, together with the added burden of water from the new freeway, part of which is in the Andrews watershed, will in the last analysis bring about this result. The velocity of the creek will also be increased to some extent. When the sewer system discharges water up to its capacity there will be a flooding of Deer Creek, a washing away of soil and the loss of trees.

Turning now to the law that bears upon the case, the Court concludes that the plaintiffs are the real parties in interest, either because their homes abut on Deer Creek or they are in close proximity to the stream so that the value of their properties may be affected by the erosion or flooding of the creek. They have no adequate remedy at law since a continuing trespass might give rise to a multiplicity of suits and much of the damage proved by them might result in irreparable injury.

> "The principle on which a court of equity has jurisdiction of cases involving water privileges rests in the preventive remedy which it can afford, to shield a person from some great, irreparable injury which may threaten him. And where the injury is of such a nature that recovery of damages will be wholly inadequate, equity may interfere and grant an injunction." "Farnham," Sec. 474, p. 1607.

The defendants have been properly joined and the Court has jurisdiction over them. The Horvitz Co. is actively engaged, under contract with the State, in the construction work which is sought to be enjoined. The Director of Highways and the Division Engineer represent the State and have an interest in the controversy adverse to the plaintiffs. Ohio Revised Code Section 5501.18 provides that the director shall not be suable in any court outside Franklin County "except in actions brought * * * by a property owner to prevent the taking of property without due process of law, in which case suit may be brought in the county where such property is situated * * *." This action is definitely one which falls within this exception. In *City of Mansfield v. Balliett*, 65 Ohio St. 451 (1902), syllabus 2 says:

> "Any actual and material interference with (riparian right), which causes special and substantial injury to the owner, is a taking of his property."

The City of Mayfield Heights and its Mayor are proper parties because the city has a beneficial interest in the construction and is helping pay for it. Certainly they have an interest adverse to the plaintiffs; and all defendants are necessary parties "to a complete determination or settlement of the question involved." (R. C. 2307.19.)

The Court has found no one case which can be said to be a precise precedent for the one here at issue. Briefly stated, what the Court must decide is: Does the fact that the county constructed a sewer 37 years ago, which drains surface water from three distant watersheds into Deer Creek, and which Mayfield Heights has used continously ever since, give a prescriptive right for all time to continue diverting water from two of the watersheds into a natural watercourse that empties into the third water-

shed? Regardless of whether or not the defendants acquired a prescriptive right to divert water from the Wilson Mills and Andrews watersheds into Deer Creek, does the present construction and its attending effects threaten violence to the riparian rights of the plaintiffs?

As a matter of law it is recognized that the right to use the water of a stream in a particular manner may be acquired by prescription. Prescription connotes a right or authority over the property of another. It relates to incorporeal hereditaments or rights such as easements (See 1 *Ohio Jur.* 2d "Adverse Possession," Section 3, page 690).

> "* * * A prescriptive right may be acquired to use water in any way in which it is susceptible of use and also to use lands in connection therewith." 56 *Am. Jur.* "Waters," Sec. 325, page 765.

The outstanding authority on water rights is Henry Philip Farnham, to whose text, *"The Law of Waters and Water Rights"* (1904) the Court will have occasion to refer herein. *Farnham* says:

> "The prescriptive right may include not only the manner of using the water, but also the regulation of its flow along its course so that an upper owner may acquire a prescriptive right to send the water down in unusual quantities when his needs require him to do so." Sec. 535, page 1745.

The requisites for and mode of acquiring water rights by prescription are set forth as follows in 56 *Am. Jur.* "Water," Section 326, page 766:

> "As a general proposition, a prescriptive right to the use of water or lands in connection therewith can be acquired only by an adverse user of the character which is requisite for the acquisition of title to lands. Translating this general doctrine into specific language, the rule is that to acquire ownership of a water

right by adverse user, the use must be continuous, uninterrupted, adverse, and exclusive under a claim of right for the prescriptive period. It must either be such that knowledge on the part of the person against whom it is claimed will be presumed from its open, notorious, and uninterrupted character, or it must be with his knowledge. While this doctrine would seem plain enough and established beyond controversy, yet in describing the elements necessary to create title by prescription in water, the courts, in their opinions, have often employed superfluous or misleading language, such as the statement that the party affected must have notice of the adverse use or possession. All that is required is either actual knowledge or user of such a character that knowledge may be presumed. So, notoriety is often spoken of as an element necessary to ripen adverse possession into a right by prescription. By this nothing more is meant, however, than that the possession should be open, visible, and so notorious that the owner may be presumed to have knowledge that it is adverse. It suffices if the acts done by the adverse claimant of water are not secret and are of such a character as are well calculated to notify the landowner or prior appropriator of the adverse claim and use. The words "open" and "notorious" as thus used, are practically synonymous."

In the instant case it is important to have in mind the nature of the trespass which defendants contend has ripened into a prescriptive right. It is not the maintenance of covered sewer pipes under Mayfield. No prescriptive right would be needed to do this for the purpose of collecting water in the Deer Creek watershed alone for discharge into that creek. It is not, as plaintiffs seem to imply, the discharge of only a given amount of water through the sewer system into the creek. It is, however, *the diversion of water from the Wilson Mills and Andrews watersheds*

into the Deer Creek watershed. This diversion became adverse to the rights of riparian owners downstream from the time when the sewer was constructed in 1925.

Now the law has made it abundantly clear that "land which is not within the watershed of a river is not riparian thereto, although it may be part of an entire tract which does extend to the river. This is the rule most generally adhered to. Land is not riparian so as to entitle the owner thereof to the use of water from a stream which is not on the watershed of the portion of the stream where the taking is sought to be made although it is on the watershed of other portions of the stream." 56 *Am. Jur.* "Waters" Section 278, page 733.

> "There is no right on the part of a municipal corporation or a drainage or road district to alter the course of drainage so as to throw water upon property where it does not naturally flow." *Farnham*, Sec. 184, page 960.

So far as this Court knows, the Supreme Court of Ohio has never dealt with a case involving diversion of water from one or more watersheds into another watershed. However, the lower courts have frequently made it clear that—

> "In the exercise of the rights of ownership, one of the usual and reasonable activities is the control and disposition of surface water and the facilitation of its final discharge in accordance with the contour of the watershed. * * *" (Emphasis added.)
>
> *Ratcliffe v. Indian Hill Acres*, 93 Ohio App. 231 (1952), at page 237.

This Court is of the opinion that water cannot be shunted from one watercourse to another if to do so will materially affect flood conditions and do substantial injury

to lower riparian rights. This is the implication of *Oakwood Club v. South Euclid,* 93 Ohio Law Abs. 153 (1960).

However, the diversion of water from one or more watersheds into another watershed may ripen into a prescriptive right provided the necessary requisites for adverse user are present. In this case the use (the diversions from the watersheds) has been continuous, uninterrupted, adverse, and exclusive under a claim of right for long over 21 years, the minimum time required in Ohio for an adverse possession. But was the diversion such that knowledge on the part of the plaintiffs (against whom the right is claimed) will be presumed from its open and notorious character, in the absence of actual knowledge? The defendants who assert the right have "the burden of proving satisfactorily and unequivocally all of these elements constituting adverse user." (56 *Am. Jur.* "Waters," Section 339, page 774.)

If the requirement were merely knowledge of a sewer under Mayfield that discharged into Deer Creek, then the Court would have no trouble in charging the plaintiffs with constructive knowledge, for the sewer is literally "open" and at times it may have become "notorious" in both the legal and popular sense at its point of discharge on Mayfield. As defendants contend, the discharge point is "in full view of all the abutting owners." But there is nothing adverse merely in maintaining a storm sewer; what is adverse, as said above, is the diversion of water from two neighboring watersheds through that sewer system, into Deer Creek and past the homes of the plaintiffs.

The defendants have not shown that the plaintiffs had any knowledge that the watershed in which they live was receiving water from two other watersheds. Nor can plaintiffs have such knowledge imputed to them. No

witness said he could discern the watershed limits by inspection; even the engineers at the trial had some difficulty in this respect from a study of the maps. Furthermore, the nature of the flow of the water in the creek throughout the period from 1925 down to recent years was moderate and not given to flooding or erosion. This fact negatives any open and notorious diversion such as might justify imputing knowedge to the plaintiffs.

Defendants have cited the case of *New York Central R. R. v. City of Cleveland, et al.*, No. 709,214 in this Court, decided in 1961, and now pending in the Court of Appeals, Eighth District, No. 25,657. Therein Judge Danaceau decided that "the diversion or casting of waters on other land enjoyed continuously for a period of 21 years ripens into a prescriptive right." The Judge pointed out, however, that the plaintiff in that case must have had actual knowledge of the diversion because it had paid an assessment for *a portion of the cost of an intercepting sewer which had* served to divert water from a foreign watershed into the creek there in question.

The law has been summarized thus in 1 *Ohio Jur.* 2d "Adverse Possession," Sec. 50, page 737:

> "It is essential to acquisition of title by adverse possession that the possession be open, or, as more usually stated, open and notorious. In the absence of actual knowledge on the part of the true owner, the possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally and with a purpose to assert a claim of title adversely to his, or so patent that the owner could not be deceived, and such that if he remains in ignorance it is his own fault. It appears that the placing of a permanent structure upon land is occupation which amounts to an open and notorious claim.

> "Some decisions list 'open and notorious' use among the elements required to establish an easement by prescription, others state that it is knowledge and acquiescence that is required. The owner of land is charged with knowledge of adverse user where the user is open and notorious so as to be a matter of common knowledge. The use of the ground under a city street for the maintenance of a water pipe is not open and notorious possession."

In consideration of the law, and the facts peculiar to this case, the Court holds that the defendants have not acquired a prescriptive right to channel water from the Wilson Mills and Andrews watersheds into Deer Creek.

The next issue which the Court must consider is whether or not the present construction of an enlarged sewer system in Mayfield Heights, in view of the results it is likely to bring about, constitutes a material threat to the property rights of the plaintiffs.

The basic principles that govern the right of a municipality to collect its surface water into sewers and drain the water into a natural watercourse within its limits have been rather well defined by courts in the past.

It is the law that "a riparian owner is privileged to make a reasonable use of the waters of the stream for any necessary and proper purpose incident to the land itself, and essential to its enjoyment, which does not materially interfere with the right of other riparian owners." (56 *Am. Jur.* Sec. 341, p. 775.)

McQuillin on Municipal Corporations, Sec. 53.136 says:

> "Provided no nuisance is thereby created, a municipality may discharge its sewers into watercourses and it will not be liable for the flooding of lands thereby unless it discharges more water into the stream than can be accommodated by it in its natural condition;

but where the discharge of drainage or sewage into a stream increases the volume of water in the stream to the damage of owners of land bordering thereon, the municipality is liable."

In *City of Hamilton v. Ashbrook*, 62 Ohio St. 511 (1900), the Supreme Court said in Syllabus 1:

"A municipal corporation is not liable for damages caused by such increased flow in a natural water course as results from the improvement of lots and streets within the territory whose waters naturally drain into such watercourse."

While the facts in *Mason v. Commissioners*, 80 Ohio St. 151 (1909) are quite different than in the instant case, the opinion contains a careful review of the law bearing on riparian rights, and the principles there established have wide application. The syllabus of the case states this general principle:

"A landowner may, in the reasonable use of his land, drain the surface water from it into its natural outlet, a watercourse, upon his own land, and thus increase the volume and accelerate the flow of water without incurring liability for damages to owners of lower lands. * * *"

There are, however, certain limitations which must be observed.

A number of lower court decisions seem to indicate that one of the tests to determine whether lower riparian rights are being violated is to inquire whether the capacity of the stream is being increased to the detriment of a downstream property owner. In *McBride v. City of Akron*, 12 O. C. C., 610 (1894) the court said (p. 618):

"* * * the upper proprietor cannot so increase the flow of that water as to go beyond the capacity of the

stream, where the water did not go beyond that capacity * * *."

To the same effect is *McCoy v. Rankin*, 35 O. L. A., 621.

The Court is satisfied that, however, the Supreme Court of Ohio has never looked with favor on the so-called capacity-of-the-stream rule, but criticized it in *Mason v. Commissioners*. Quoting from a North Carolina decision and declaring that it embodies the law of Ohio on the subject, the court said (pp. 174-5):

"We are aware that great hardship may sometimes occur from the unlimited right of increase and acceleration, and that there are some authorities limiting it to the capacity of the natural outlet, but we must adhere to the rule as the result of our deliberate judgment. However short it may fall as a theoretical definition of ideal right, we can frame none better that is capable of practical application.

"Its limits are clearly defined by the natural landmark of the watershed, which, seen of all men, renders it easy of application and capable of definite proof. Any other rule would prevent the drainage of large bodies of swamp lands of great natural fertility and capable of the highest degree of improvement, but now worse than useless. They will eventually be needed to support an ever-increasing population, and to shut them up indefinitely as the mere homes of disease is repugnant to the highest principles of public policy and of private right. *Suppose the natural capacity of the watercourse was made the test of the rule; it would be so extremely difficult of application as practically to destroy its value.* What is the natural capacity of a stream? Is it measured at low water or at high water? Almost any stream can carry off whatever water may be made to flow into it in dry weather, or perhaps even in ordinary times. On the contrary, the clearing up of our lands is having the double effect of greatly accelerating the flow of water

and at the same time filling up our streams with sand, so that very few of them can now carry the water naturally flowing into them after heavy rains." (Emphasis added.)

More recently the test of reasonable use has been applied to determine whether riparian rights are being violated. In *Radcliffe v. Indian Hills*, 93 Oh. App. 231 (1952) it says at p. 236:

"In 1 American Jurisprudence, 505, Section 3, it is stated:

'It is not to be inferred from this statement of the rule that the law forbids any and all uses of property which may cause loss, damage, or inconvenience. Every person is entitled to make a reasonable use of his property. Therefore while the rightful use of one's own land may not infrequently have some effect to diminish the value of an adjoining estate, or to prevent its being used with the comfort which might otherwise have been anticipated, this is damnum absque injuria, as to which the law cannot interfere.'

"At page 506, *ibid.*, it is said:

'The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or whether the injury was the natural consequence, or whether the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also, public policy.'

"Substantially the same statement of the law is found in 1 Ohio Jurisprudence, 413 *et seq.*

"In the exercise of the rights of ownership, one of the usual and reasonable activities is the control

> and disposition of surface water and the facilitation of its final discharge *in accordance with the contour of the watershed,* and so long as no unreasonable or negligent act is committed by the owner of the dominant estate, the servient estate has no cause of action, notwithstanding he may suffer some incidental damage or his burden be somewhat increased." (Emphasis added.)

As to what is reasonable use, 56 *Am. Jur.* Sec. 342, p. 779, says:

> "No rule can be laid down as to what is a reasonable use which will, without variation or qualification, apply to the facts of every case, but the reasonableness of the use depends on the circumstances of the particular case. In determining the question it is proper to consider the use intended and its extent, duration, necessity, and application; the size of the stream, the velocity of the current, the nature of the banks, and the character of the soil; the importance and necessity of the use claimed by one party, and the extent of the injury caused by it to another; climatic conditions; the uses and customs of the neighborhood; convenience in doing business, and the indispensable public necessity of cities and villages for drainage."

In applying these tests to the instant case the Court is impressed by the fact that the proposed sewer will more than double the present capacity to discharge water into Deer Creek. Assume that no more rain or snow will fall to the ground in the next 10 years than did in the last 10 years. Still the Court is not satisfied that the same amount of water will find its way to the creek as in the past reached it either through the old sewer or overland. More water is bound to get to the creek because of the expanding character of the neighborhood. More homes, more shopping centers, more paved areas, the freeway—all will help make the area more impervious.

In the judgment of the Court the stream will greatly increase in volume and its velocity will be somewhat greater. This will result in a continuing trespass upon the lands of the plaintiffs, and a recurring loss of trees and soil due to erosion.

Now the Court is well aware of the importance of the improvement being made by the defendants. The enlarged storm sewer will be functioning for many years and will be serving a community that is bound to grow. With more growth of the upper riparian owner will come more hardship upon the lower owners. Mayfield Heights must have drainage; at the same time individuals still must be protected in the lawful enjoyment of their homesites. Now is the time to face this situation.

One of the circumstances to be considered on the question of reasonableness of use is that of the diversion of the two other watersheds beyond their boundaries and into Deer Creek.

In *"Principles of Water Rights Law in Ohio"* by Charles C. Callahan (1959) the writer says (Sec. 21):

> "Where the use of a stream is controlled by the doctrine of riparian rights it is held generally that such water may not lawfully be diverted from the stream for use on land which, although it may otherwise qualify as riparian, is beyond the watershed of the stream from which the water is taken."

This principle is set forth as follows in 56 *Am. Jur.*, "Water," Sec. 74, p. 561:

> "It has already been observed that the right of one to accumulate and discharge surface water into a natural watercourse and thereby accelerate the flow or increase the volume thereof, without liability for damages, is subject to the general limitation that it be done in the reasonable use of his own land. Another important limitation upon such right is that *an owner*

> *of property may not drain into a stream surface waters which otherwise would not flow in that direction.* That is, the dominant owner may not, by ditches or drains, or the removal of natural barriers, direct surface water from its natural course into a stream, to the damage of lower proprietors." (Emphasis added.)

What emphasizes the unreasonable use in the present case is the unlawful collecting of water from the two other watersheds by the old sewer and the dumping of it into Deer Creek. There is no testimony as to how much water is being collected from the two "foreign" watersheds, respectively. But it is obvious on inspection of the watershed map (Defendants' exhibit B) that about 39% of the land area being drained into Deer Creek is actually in the other two watersheds. This diversion coupled with the changing character of the neighborhood in Mayfield Heights, and immediately the addition of water from the new freeway, is what in the opinion of the Court will place an unwarranted burden on the stream when and if the new sewer were to be discharging into it. Without such diversion all of the water collected by the new sewer would be coming from the Deer Creek watershed, and then the plaintiffs could not be heard to complain if the other incidents to the use were reasonable.

In the *Oakwood Club* case the court made it clear that diversion from another watershed into the stream involved in that case was not material, and that water may rightfully "seek its natural outlet *in the channel developed with the contour of the land.*" Syllabus 1. That does not reflect the situation in the instant case; the water in two watersheds is not being let seek its natural outlet.

There is a material diversion of water from Wilson Mills and Andrews watersheds into Deer Creek watershed.

This is harmful to the rights of the lower riparian proprietors. If this were not true the Court would have to apply in this case the law of the *Oakwood Club* case wherein Judge Hunsicker said:

> "* * * a municipality may collect, into sewers, the surface water which comes from a watershed area within its borders, and *discharge it into such watercourse,* without liability to the lower owner, even though in so doing incidental damage may occur to the lower proprietor." (Emphasis added.)

The problem here presented arises from no fault of the City of Mayfield Heights. The diversion of water from the two watersheds was made by the county years ago, long before the potential harm of the diversion could be foreseen by anyone. Now changed conditions have brought it into focus. The coming of the new freeway is what brought the proposal of a new sewer to a head. In view of the law the Court cannot sidestep the duty of granting relief to homeowners who will suffer substantial injury, even though to do so may inflict hardship on the City which is free from having initiated the circumstances that make the Court's action imperative.

The Court grants the prayer of plaintiffs' petition for a permanent order restraining the defendants or anyone on their behalf from continuing the construction of the new 72-inch storm sewer along Mayfield Road east of S.O.M. Center Road, or from discharging any water into Deer Creek from said new sewer.

OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

(July 6, 1962.)

SKEEL, *J.*

This appeal comes to this court on questions of law and fact from a decree entered for the plaintiffs after trial in the Common Pleas Court of Cuyahoga County. The plaintiffs, with the exception of the Village of Gates Mills, a municipal corporation, which became a party plaintiff by intervention and agreement, are all residents and landowners in a part of the Village of Gates Mills situated in what can be described as the "Deer Creek" Watershed located north of Mayfield Road and East of SOM Center Road.

One defendant, the City of Mayfield Heights, is a municipal corporation in part located contiguous to and west of Gates Mills and through which Mayfield Road (U. S. Route 322) (running in an easterly and westerly direction) and SOM Center Road (State Route 91) (running in a northerly and southerly direction) run, said roads intersecting near the northeasterly border of the city. Another defendant, The Horvitz Company, an Ohio Corporation, is a construction company holding a contract with the State of Ohio for the construction of a section of the "North-South" limited access highway which proceeds in a general northerly and southerly direction just west of SOM Center Road and at this point through the City of Mayfield Heights. The remaining defendants are Edwin T. Frantz, Mayor of the City of Mayfield Heights, Gilbert Donovan, Division Engineer of the Department of Highways, State of Ohio, and Everett S. Preston, Director of Highways of the State of Ohio.

The amended petition in part alleges that the building of said limited access highway is under the direct super-

vision and control of the defendants, that the construction company has begun to construct a storm sewer in Mayfield Road beginning at or about the location of what is known as "Golden Gate Shopping Center" and proceeding from there through the intersection of Mayfield Road and SOM Center Road "to a point within approximately one hundred (100) feet of the common boundary line between Mayfield Heights and the Village of Gates Mills, where the said storm sewer shall end and discharge its flow of water over the lands and past the homes of the plaintiffs and other residents of the Village of Gates Mills."

The undisputed fact is that this sewer now in the process of construction, if permitted, will empty into Deer Creek, a natural stream which passes under Mayfield Road at the point indicated and from there proceeds northerly and at points easterly until its flow of water empties into Chagrin River, some 9000 feet from Mayfield Road and will parallel the easterly part of an existing forty-eight inch (in part) storm sewer which was constructed in 1925.

It is alleged that the new storm sewer is to be six feet in diameter, that it will collect and drain surface waters from Golden Gate Shopping Center and SOM Center Road and from East Gate Shopping Center. Golden Gate Shopping Center is just west of the new throughway on the south side of Mayfield Road, its buildings and paved parking space covering about fourteen acres. It was built in 1954. East Gate Shopping Center is at the northeast corner of Mayfield Road and SOM Center Road, its buildings and paved parking area covering about forty acres. It was constructed in 1955. It is also alleged that other commercial buildings and residences will be built from which drain water will be collected and drained into the six foot drain water sewer. It is further alleged that there is a forty-eight inch storm sewer which empties into Deer

Creek at the same point where the six foot sewer will discharge its flow. In addition, it is alleged that in recent years during periods of rainfall the water discharged from the forty-eight inch drain sewer and other sewers into Deer Creek has frequently caused it to overflow and damage, by erosion, plaintiffs' lands and that said overflow has destroyed large and valuable trees. It is alleged that the flow of water crosses under Hickory Lane, a dedicated street in the Village of Gates Mills and farther on under a bridge on West Hill Drive, a dedicated street in Gates Mills. It is also alleged that any increase in the flow of water along this natural watercourse during these periods of rainfall will cause irreparable damage to the streets, bridges, and abutting properties.

It is further alleged that the unnatural diversion and collection of surface waters and the unnatural discharge of the same in such volume and rate of flow over the lands and homes of the plaintiffs will cause irreparable damage to the plaintiffs' lands and homes, that the defendants' conduct as alleged is a taking of plaintiffs' property without due process, and that "the construction of said sewer will divert said surface waters from their natural flow upon other lands than the lands of these plaintiffs to an unnatural flow upon the lands of these plaintiffs." The plaintiffs allege that they were uninformed that the seventy-two inch sewer would proceed east of SOM Center Road until two weeks before this action was commenced. The plaintiffs seek to enjoin the construction of the remaining part of this seventy-two inch storm sewer.

The answer of the Mayor of the City of Mayfield Heights after admitting the construction work in connection with the North-South limited access highway within the city, including the size, character and purpose of the drain sewer described by the plaintiffs, denies that the

plaintiffs were uninformed of its proposed construction and alleges that it had been the subject of public announcement for two years before the work began and that all but a few feet of the sewer was finished before this action was commenced. It is admitted that the new six foot drain sewer (paralleling the present forty-eight inch sewer, which old sewer begins at Lander Road much farther to the west) will, as does the old sewer, drain storm waters collected south of Mayfield Road beginning at the Golden Gate Shopping Center and from there easterly to SOM Center Road, including that drain water collected from homes and business places in that area, but denies that storm waters falling north of Mayfield Road except for a very narrow strip of the frontage on Mayfield Road, will reach either the old or new storm sewer and denies that such sewer will collect the drain waters from the East Gate Shopping Center.

The answer also alleges that over the years the character of the neighborhood around the intersection of Mayfield Road and SOM Center Road has changed into a modern residential area with shopping centers, paved streets, apartment buildings, parking lots and the like, which accelerates (during rain storms) the flow of surface water into natural drainage areas. It is further alleged that Deer Creek at all times has been a natural watercourse within its natural drainage area which is in part located in the area of the City of Mayfield Heights, as described herein, that whatever development reasonably to be anticipated resulting in acceleration of drain water into Deer Creek does not create in the plaintiffs any legal right as lower riparian owners of land through which Deer Creek runs since their rights are servient to defendants' rights to the natural use of Deer Creek as upper riparian owners, that if any injury results it is "damnum

absque injuria," that the construction of the new storm sewer will not drain surface waters not now draining into Deer Creek, and that the waters drained into Deer Creek are from its natural drainage area. It is also alleged that if there is a diversion, such diversion occurred in 1925, and has been open, notorious and adverse to the plaintiffs for over twenty-one years and, therefore, the City of Mayfield Heights and the State of Ohio have acquired a prescriptive right to continue as they have done from and since the construction of the forty-eight inch sewer in 1925 in the County of Cuyahoga.

It is further alleged that the plaintiff, the Village of Gates Mills, has constructed a culvert over Deer Creek inadequate to the needs of the stream and is responsible for creating flooded areas during heavy rains. It is also alleged that injunction is not the proper remedy under the circumstances, the plaintiffs having an adequate remedy at law.

The remaining defendants, by separate answers, deny that they threaten to do any unlawful act with respect to the plaintiffs to their damage or to take their property without due process of law, and by general denial, deny each allegation of the petition not admitted to be true. Both the defendant Preston and defendant Donovan challenge the jurisdiction of the court and specifically state that the answer required of them shall not be construed as an entry of appearance.

A reading of the transcript with the exhibits attached which has been presented to this court by stipulation as the evidence which the court shall consider in determining the issues of fact discloses the following facts, many of which are not in dispute and all of which are supported by the greater weight of the evidence.

In 1925 the County of Cuyahoga developed a storm

sewer system in the territory of what is now in the easterly part of the City of Mayfield Heights referring particularly to Mayfield Road from Lander Road to a point five hundred feet east of SOM Center Road and the streets running north and south from Mayfield Road in this area. A storm sewer was laid in Mayfield Road from Lander Road to the Mayfield Road culvert over Deer Creek at which point such sewer empties into Deer Creek. The diameter of this sewer beginning at Lander Road is twelve inches and from there enlarges at many points depending on the grade of flow to forty-eight inches at the Deer Creek culvert. There were a number of small drain water sewers constructed in some of the streets intersecting Mayfield Road east of Lander Road connecting with the Mayfield Road sewer. There was also a drain water sewer constructed in Orchard Park Boulevard and connected with the Mayfield Road sewer flowing north and emptying into Wilson Mills Creek. A storm sewer was also constructed in SOM Center Road beginning about two thousand feet south of Mayfield Road and connected at the intersection of SOM Center Road with Mayfield Road with the Mayfield Road sewer. There was also a sixty inch storm sewer going northerly from Mayfield Road in SOM Center Road about five hundred feet and then turning easterly five hundred to five hundred twenty-five feet as a forty-eight inch sewer running into a ditch which emptied into Deer Creek. The construction of this described drain sewer was a WPA project, the work having been done in 1938 or 1939. The portion of the sewer that turned east five hundred feet north of Mayfield Road was laid in a natural drainage channel which originated on the westerly side of SOM Center Road, proceeded easterly through a culvert, and before the sewer was built, there was a ditch from this culvert which emptied into Deer Creek.

There are three watersheds which run in a northerly direction across Mayfield Road in the territory through which the Mayfield Road sewer passes between Lander Road and Deer Creek. Beginning at Lander Road and going east they are known as the Wilson Mills Watershed, the Andrews Watershed and the Deer Creek Watershed. In the case of the Wilson Mills Watershed there was not a sufficient collection of water to create a swale or stream south of Mayfield Road to require a culvert to protect such road from the flow of surface water. In fact the very beginning of Wilson Mills Creek was noted by the plaintiffs' witness as being several hundred feet north of Mayfield Road. This same fact situation is equally true of the Andrews Watershed except that the point at which the stream originates as indicated by the same witness is probably not more than three or four hundred feet north of Mayfield Road. The beginning of Deer Creek, however, was indicated as being well south of Mayfield Road.

The construction of the Mayfield Road drainage sewer in 1925 with a connecting sewer running north in Orchard Park Boulevard which is located near the most easterly boundary of the Wilson Mills Watershed, which drain sewer empties into Wilson Mills Creek, was planned by the Cuyahoga County Sanitation Department. It was intended by the general plan to and, at the time, did solve surface water drainage problems for the land lying south of Mayfield Road and just a very narrow strip to the north from Lander Road to SOM Center Road. Just how much of the drainage collected from the Wilson Mills and Andrews Watersheds is diverted north to Wilson Mills Creek through the sewer in Orchard Park Boulevard is not disclosed by the record. That there must be a considerable flow north in the sewer under Orchard Park Boulevard from the Mayfield drain sewer is evidenced by the change

of the diameter of the Mayfield sewer at that point from forty-two inches to twenty-seven inches. In fact the testimony of a defendants' witness that there is no way to determine this fact is not controverted.

The territory drained by the Mayfield sewer plan of 1925 has had a considerable residential and commercial development since 1950. Many streets have been paved and houses and commercial areas built so that the surface water collected and disposed of through sewers rather than seeking a common channel by seepage through the ground has increased considerably. The East Gate Shopping Center at the northeast corner of Mayfield Road and SOM Center Road covers an area of forty acres either with buildings or hard top parking lots. Golden Gate Shopping Center on the south side of Mayfield Road just west of the new freeway covers about seventeen acres with like improvements. The plaintiffs' evidence is to the effect that no noticeable increase in the flow of Deer Creek occurred until after East Gate was built. It must be remembered that East Gate is within the natural drainage area of the Deer Creek Watershed.

The new freeway now under construction passes through the two most easterly watersheds, that is, Andrews and Deer Creek. Most of this construction is in the Deer Creek watershed, including three of the Cloverleaf interchange quadrants. The northwest quadrant of such interchange in which a retention basin has been constructed is drained into Andrews Creek. The construction of the freeway included the building of the seventy-two inch drain sewer which is the subject of this action, and which is built parallel to and is interconnected with the Mayfield Road surface drain sewer. The southerly segment beginning just west of the easterly border of the Golden Gate Shopping Center proceeds easterly and just

past the center of the freeway, and the northerly segment being on the north side of Mayfield Road beginning west of the right of way of the freeway runs from there eastward, turning somewhat to the north after it passes East Gate, and ends at Deer Creek. As indicated, it is interconnected with the Mayfield Road drain sewer both in the center of the right of way of the freeway and at the intersection of Mayfield Road and SOM Center Road. The territory from which surface water will drain into the new sewer is wholly within that which has been drained by the original Mayfield surface water sewer since it was installed more than thirty-seven years ago. Most of the new sewer had been installed before this action was brought, there remaining to be installed only a short segment east of SOM Center Road. The evidence is to the effect that the size of the new sewer was dictated by the City of Mayfield Heights in giving its consent to the construction of the freeway through the city and that the size was dictated by what might be required because of future development. It is also perfectly clear that whatever part of the capacity of the new sewer estimated as one-half after heavy rains is needed by the Village of Mayfield Heights, its purpose was to take care of the growing inadequacy of the present drain sewer in Mayfield Road in the immediate area of the new freeway. The construction of the freeway including the necessary sewers through Mayfield Heights has been a matter of public concern and of public notoriety for over two years prior to the time that the construction started.

Moreover, as a part of the surface drainage sewer plan for the territory here in question, a sewer was constructed in Orchard Park Boulevard and connected with the Mayfield sewer, the flow of which was north from Mayfield Road to Wilson Mills Creek. The size of the

Mayfield sewer as it enters this intersection of Mayfield Road with Orchard Park Boulevard is forty-two inches. The plan shows at this point a "42 stub Blkd" branches off into Orchard Park. Proceeding east from this connection the size of the Mayfield sewer is reduced to a diameter of twenty-seven inches. The reduction in size cannot be explained by an increase of the degree of slope said to be a factor in determining the size of a drain sewer as is shown by the constant changes in the size of the Mayfield sewer from Lander Road to Deer Creek. Here the degree of slope on both sides of this change of the size of the sewer was three tenths per cent. By reason of the location of the Orchard Park Branch of the Mayfield sewer system which is located near the easterly boundary of the Wilson Mills Watershed, the amount of diversion of drain water from the Wilson Mills Watershed must have been greatly reduced. One of the defendants' expert witnesses testified that it would be impossible to determine the amount of surface water that would thus be emptied from the Mayfield sewer into Wilson Mills Creek.

The record shows that the acreage of that part of the three watersheds lying south of Mayfield Road between Lander on the west and Deer Creek, the eastern boundary of the watershed, was five hundred seventy acres. The evidence also shows that the percentage of rain water that drains off this territory in a rain storm is thirty-nine hundredths per cent, and that in the event of a storm of sufficient intensity as to result in one inch of rainfall per hour, the runoff of that part of the watershed south of Mayfield would be three hundred forty-eight cubic feet per second. The three drain sewers now emptying into Deer Creek at or near the Mayfield culvert, that is, the sixty inch sewer through East Gate, the forty-eight inch sewer in Mayfield and the fifty-four inch oval sewer just

constructed to pick up the head waters of Deer Creek south of the Mayfield culvert and east and in part west of SOM Center Road, if running at full capacity, would discharge five hundred sixty-eight cubic feet of water per second. Without the fifty-four inch oval sewer, which is entirely within the Deer Creek watershed, the total capacity of the forty-eight inch and sixty inch sewers running full would be two hundred seventy-eight cubic feet per second. The capacity of Deer Creek is in complete dispute, plaintiffs' expert testifying that it was two hundred fifty cubic feet per second while defendants' expert estimated its capacity as six hundred six cubic feet per second. Just how there could be such a difference resulting from engineering computations of physical facts is hard to comprehend. But when the plaintiffs' evidence does not show a dangerous or damaging flood since the "Fifty Year" storm of June, 1959, when the rainfall was three and nine tenths inches per hour, although the rain chart shows that from August 3, 1960, until August 21, 1961, there were ten storms, the most severe of which was on August 21, 1961, lasting ninety-eight minutes, in which the rainfall was at the rate of one inch per hour, the dangers alleged because of the construction of the seventy-two inch sewer seem to be without foundation. This is especially true when considered with the fact that this new sewer is designed to drain surface waters only within a part of the territory now drained by the existing Mayfield sewer. There was one storm on July 30, 1961, when the rainfall was at the rate of two and four tenths inches per hour but its duration was only fifteen minutes.

The fact that the drainoff will be three hundred forty-eight cubic feet per second (which must be reduced by the amount of discharge into the Orchard Park branch) while the sewer capacity at maximum flow is two hundred

seventy-eight cubic feet per second only demonstrates the need for the relief to be provided by the seventy-two inch sewer. However. it is not demonstrated by the record that under ordinary circumstances anything less that a "Ten Year" storm will exceed the capacity of Deer Creek.

The plaintiffs spent considerable time in trying tc demonstrate that because of the topography of Mayfield Road the statement made by one of defendants' experts that where the rate of rainfall exceeds the sewer capacity surface water would flow overland to Deer Creek was incorrect since it was physically impossible. The evidence of plaintiffs' engineer shows that between Golden Gate Boulevard, whicn runs north from Mayfield Road directly across from the east side of Golden Gate Shopping Center, at the north curb or gutter the geographic level is one thousand seventy-two feet above sea level while to the west of this point, some two hundred feet, such level is one thousand sixty-nine and seventy-five hundredths feet, making a valley of twenty-four and one-half inches at the lowest point. Farther to the west, Mayfield Road rises to a point nine feet above the low point at Lander Road. The evidence of this witness is also to the effect that the sidewalk level to the north of the low point is ten inches above the curb and that the curb is four inches high. While it is clearly evident that water cou d not flow east up the hill and would overflow to the north at the low point if rain water were to gather at the low point sufficiently deep to go over the bounds of its confinement, the question is purely academic inasmuch as there is no evidence that there was such flooding over the north sidewa'k. The evidence does show, however, that there is considerable gathering of drain water at certain points of the parking area of Golden Gate Shopping Center and at other places which allows the excess water to flow into the sewers as

their capacity permits. However, from the trend of the record the purpose of this evidence was to discredit defendants' expert and consideration of it will be confined to that question.

The issues presented are first, whether the City of Mayfield Heights or the State of Ohio has gained a prescriptive right to discharge whatever surface water is in fact diverted by the present sewer system from the Wilson Mills and Andrews Watershed into Deer Creek. The second issue is, whether the upper riparian owners have the right to increase the periodic flow of drain water caused by rainfall where, by reason of residential and commercial developments within the territory, such collection and discharge of surface water in sewers makes such discharge immediate and in considerably larger volume at the time of rain rather than the disposition of surface water through the ground in its natural way and thus to find its way slowly to a common outlet or stream. Two other questions might also need consideration. The first is, whether under the circumstances the plaintiffs have an adequate remedy at law and secondly, whether the plaintiffs, after having permitted large expenditures of public funds in the installation of most of the sewer, can now seek equitable relief to enjoin the completion of it.

Most of the authorities on the establishment of a prescriptive right with respect to water in a stream are concerned with the use of such water rather than that of an upper riparian owner increasing the discharge of surface water into the stream. But when dealing with the subject of a municipal corporation or the state in furnishing drain sewers in the interest of public health and safety where some diversion from one watershed to another results in moderate degree, the authorities, although not unanimous, support the proposition that where such di-

version has continued in open and notorious fashion for the period of time by which a prescriptive right is obtained and where the sewers have been authorized by acts of public authority spread upon the records, a prescriptive right to continue such seasonable diversion is gained even though some detriment may fall upon lower riparian owners. This theory was supported by the case of *Foot vs. Bauman*, 333 Mass., 214, 129 N. E. 2d 916, where the controversy was between private citizens and not public authority.

Our conclusion on this question is that the County of Cuyahoga (its sanitation division having planned and installed the sewers here concerned in 1925), a branch of the state government, and the City of Mayfield Heights, have gained a prescriptive right to continue to use the Mayfield Road drain sewer in Mayfield Road from Lander Road to Deer Creek together with the right to make whatever improvements are found necessary to meet increased flow because of the development of the area and the public improvements made in the interest of the public even though there may have been and there will continue to be some diversion of drain water from the Wilson Mills and Andrews Watersheds. Certainly, after a thirty-seven year period of continuous, open and notorious operation of a surface drain sewer, which in order to drain the area that has been thus served requires enlargement, made necessary by the residential and commercial development and necessary public improvements in the territory, such lower riparian owners below that of the city where the stream originates and into which stream the drain sewer has thus been permitted to flow cannot enjoin the installation of such necessary enlargement of such public facility. This conclusion is supported by this Court in the case of *Oakwood Club vs. City of South Euclid*, 83

O. L. A. 153, 165 N. E. 2d 699, where it was held that without a prescriptive right due to the passing of time a lower riparian owner could not complain of moderate diversion from other watersheds by city sewers and such moderate diversion could not be enjoined. On page 702 of the Northeastern (Second) Report, the court said:

> "We, therefore say, in the instant case, that: where a watercourse exists on the land of an upper proprietor, he may collect the surface water arising on his land into sewers or drains, and discharge it into such watercourse without liability to the lower owner; so also a municipality may collect, into sewers, the surface water which comes from a watershed area within its borders, and discharge it into such watercourse, without liability to the lower owner, even though in so doing incidental damage may occur to the lower proprietor."

We also conclude that the increase of the flow of drain water into Deer Creek that may result from the enlargement of the capacity of the present sewer within its drainage area to supplement its inadequate capacity because of the residential and commercial growth of the area served does not create in the plaintiffs a legal or equitable right to enjoin the construction of such supplemental sewer. A community has a right to grow and in the process to protect its citizens against the harm of flooding drain water. Associated with this right is the reasonable use of natural watercourses through which drain water may be discharged by an upper riparian owner without being subject to liability for the increase in flow to lower riparian owners.

In the case of *City of Hamilton vs. Ashbrook*, 62 Ohio St., 511, 57 N. E. 239, the Supreme Court of Ohio said in the first paragraph of the syllabus:

"A municipal corporation is not liable for damages caused by such increased flow in a natural water course as results from the improvement of lots and streets within the territory whose waters naturally drain into such water course. (Springfield v. Spence, 39 Ohio St., 665, followed and approved.)"

Also, in *Mason vs. Commissioners of Fulton County*, 80 Ohio St., 151, 88 N. E. 401, the court said in the syllabus:

"A landowner may, in the reasonable use of his land, drain the surface water from it into its natural outlet, a watercourse, upon his own land, and thus increase the volume and accelerate the flow of water without incurring liability for damages to owners of lower lands; and his land is not subject to assessment for the cost of a ditch, or an improvement, that will not benefit its drainage but is constructed to prevent overflow from the watercourse or to benefit the drainage of servient lands."

See also, *Nagy vs. City of Akron*, 27 Ohio App., 250, 161 N. E. 226; *Oakwood Club vs. City of South Euclid, supra.*

Thus, it must be concluded that the plaintiffs, if any damages are sustained from any wrongful act of the defendants, have an adequate remedy at law and cannot avail themselves of the remedy of injunction to enjoin the construction of a necessary part of an important public improvement on the state of the record in this case and the facts found as herein stated.

Holding these views, it is not necessary to consider the question of laches or the jurisdiction of the Court over the Highway Director.

Decree for defendants. Exceptions. Order see journal.

KOVACHY, *P. J.*, and HURD, *J.* concur.

ASSIGNMENTS OF ERROR FILED IN THE SUPREME COURT OF OHIO.

Appellants claim that the final judgment of the Court of Appeals for Cuyahoga County should be reversed because of the following errors, to-wit:

(1) Appellants were denied the right to a trial de novo and to introduce additional evidence in the interest of justice in violation of Article IV, Section 6 of the Constitution of the State of Ohio.

(2) The final order, judgment and decree, insofar as it finds plaintiffs guilty of laches is unsupported by any evidence whatsoever, so that these parties have been deprived of their property without due process of law in violation of Amendment XIV of the Constitution of the United States and of Article I, Section 16 of the Constitution of the State of Ohio.

(3) The judgment rendered is contrary to law, and its effect constitutes the taking of private property for public use without compensation in violation of Article I, Section 19 of the Constitution of the State of Ohio.

(4) In denying plaintiffs-appellants due course or process of law in violation of Amendment XIV of the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Ohio by failing to rule on plaintiffs-appellants motion for new trial and in defeating the purpose of such motion by vacating the journal entry against which such motion was directed; by entering a "corrected" journal entry without notice to plaintiffs-appellants and in refiling plaintiffs-appellants' motion for new trial without their authority or consent, treating it as though it were directed to the "corrected" journal entry, and then overruling the same.

(5) In denying plaintiffs-appellants due course or process of law in violation of Amendment XIV of the Con-

stitution of the United States and Article I, Section 16 of the Constitution of the State of Ohio by vacating the judgment against which a motion for new trial had been filed, and then summarily entering another judgment in the same cause without giving plaintiffs-appellants any notice, hearing or opportunity to present evidence as prescribed by statutes.

(6) In finding the defendants-appellees acquired any prescriptive rights to increase the flow of storm sewers into Deer Creek above that maintained during the claimed prescriptive period.

(7) In finding that defendants-appellees acquired any rights whatsoever against plaintiffs-appellants, the Village of Gates Mills, whether by estoppel, prescription, adverse possession or laches.

(8) Failure to hold the rights of plaintiffs-appellants, the Village of Gates Mills, with respect to maintaining public streets, superior to those of defendants-appellees.

(9) In finding that the existence of plans for sewer work to be done in connection with the freeway in the office of the Director of Highways constitutes constructive notice to plaintiffs-appellants herein.

(10) Other errors manifest upon the face of the record.

OPINION OF THE SUPREME COURT OF OHIO.

(Rendered March 4, 1964.)

1. An upstream municipality may collect, by means of sewers, the surface water from a watershed area within the corporate limits and channel it into a natural watercourse which originates in or passes through such watershed area within the municipality, thus increasing the volume and accelerating the flow of water in the watercourse, without incurring liability to the downstream municipalities or landowners. (*Mason v. Commissioners of Fulton County* [1909], 80 Ohio St., 151, approved and applied.)
2. A continuous, open and adverse diversion of surface water from one watershed to another ripens into a prescriptive right after the passage of 21 years from the date the water is first discharged into the second watershed.
3. Where a public sewer is open at its point of discharge, where the plans, specifications, times of construction and other factual data regarding the public improvement are matters of public record, and where the sewer diverts surface water from one watershed to another, persons who might be adversely affected by the improvement as chargeable with knowledge of such diversion.
4. A prescriptive right to divert surface water from one watershed, or a portion thereof, to another is not limited to the quantity of water originally so diverted but rather includes all the surface water which may run off such foreign watershed through reasonable use of such land by a municipality or the inhabitants of such land.
5. An action to enjoin the construction of large public improvements commenced after the expenditure of substantial sums of public moneys for such construction and more than two years after the plaintiff was aware of the proposed public improvement is barred by plaintiff's laches.

(Nos. 37905 and 37906—Decided March 4, 1964.)

APPEALS from the Court of Appeals for Cuyahoga County.

Plaintiffs, with the exception of village of Gates Mills, are residents of a part of such village situated in what is described as the Deer Creek watershed located north of Mayfield Road and east of SOM Center Road in Cuyahoga County. The defendants are the city of Mayfield Heights, which is contiguous to and west of Gates Mills; The Horvitz Company, which holds a contract with the state of Ohio for the construction of a section of the "North-South" limited access highway through Mayfield Heights; the Mayor of Mayfield Heights; the division engineer of the Ohio Department of Highways; and the Director of Highways of the state of Ohio.

Early in 1961, after the statutorily required public hearings, the acquiring of right of way, the advertising of specifications and the awarding of contracts, the state of Ohio, as part of the interstate defense highway program, began construction of a $5,000,000 interchange in Mayfield Heights. In conjunction with this project, the state of Ohio, the federal government and the city of Mayfield Heights determined that it was necessary to construct a 72-inch sewer parallel to the existing sewer along Mayfield Road from a point approximately 200 feet west of Golden Gate Boulevard (west of the interchange) to a terminus at Deer Creek, approximately 400 feet east of SOM Center Road, all within the city of Mayfield Heights.

In December 1961, the plaintiffs commenced this action to enjoin the defendants "from continuing the construction of the storm sewer now being laid by the defendants along Mayfield Road east of SOM Center Road." However, before this action was brought, most of the new

sewer had been laid, there remaining to be installed only that segment east of SOM Center Road.

Defendants city of Mayfield Heights and the mayor thereof and defendants The Horvitz Company, the Director of Highways and the division engineer of the Department of Highways filed separate appeals on questions of law and fact to the Court of Appeals from a judgment granting an injunction, which court, upon motion, consolidated the two separate appeals.

The Court of Appeals dismissed the plaintiffs' petition, and thereafter the sewer was completed and placed in operation.

The factual background of this controversy is that in 1925 Cuyahoga County, a subdivision of the state, laid a system of storm sewers through what is now Mayfield Heights. The main sewer line therein originated as a 12-inch tile at Lander Road and proceeded east under Mayfield Road to a 48-inch tile terminus at Deer Creek approximately 400 feet east of SOM Center Road. The size of the Mayfield Road sewer varied at different points in this run and in addition such sewer was connected with collection sewers running principally to the south of Mayfield Road.

From point of origin to terminus, the 1925 Mayfield Road sewer traversed all or portions of three watersheds, viz., Wilson Mills Creek, Andrews Creek, and Deer Creek. The 1925 storm sewer extended (1) through the Wilson Mills Creek watershed east from Lander Road to Fruitland and Orchard Park Roads, (2) through the Andrews Creek watershed from Fruitland to Golden Gate Boulevard, and (3) from the east boundary of Andrews Creek watershed to Deer Creek. (The watercourses in these watersheds run north and ultimately into Lake Erie.) The 1925 sewer and its connecting lines drain surface water off that

portion of the three watersheds lying generally south of Mayfield Road into Deer Creek. The total area of these watersheds lying south of Mayfield Road between Lander Road and Deer Creek is about 570 acres.

Although the sewer constructed in 1961 and 1962 does not extend as far west as the 1925 sewer, they both run parallel to Mayfield Road and empty into Deer Creek at approximately the same point. At various points the two sewers are interconnected so that the new and old sewers operate as a single sewer system. The termini, within Mayfield Heights, are approximately 1,000 feet from the boundary of Gates Mills.

Deer Creek flows in a generally north-northeasterly direction through Mayfield Heights, past the sewer termini and thence through Gates Mills to the Chagrin River. From the sewer termini to the river, the stream drops about 350 feet. The bed of the stream is flat and composed of bedrock, shale and clay. After crossing the boundary into Gates Mills, Deer Creek continues through a ravine which measures approximately 15 feet in depth at its shallowest point and about 90 feet in depth at its deepest point. The ravine is an unimproved wilderness. Scattered throughout the ravine are numerous trees of various types. The homes of the abutting-property owners have been, without exception, constructed at the top of the ravine, and these homes, except for one, are situated from 30 to 100 feet back from the edge of the ravine.

Since 1925, the territory drained by the Mayfield sewer system has had a considerable residential and commercial development. Many streets have been paved, and houses and commercial areas, such as shopping centers, have been built, so that the surface water collected and disposed of through sewers, rather than through evaporation, percolation and transpiration, has increased considerably.

In 1953, plaintiff Munn constructed a macadam road across Deer Creek, on a dirt and rock fill, with an 84-inch concrete culvert at creek level for the passage of water, which was thereafter dedicated to and accepted by Gates Mills. On June 1, 1959, when the entire Cuyahoga County area experienced an extraordinary 3.9-inch rainfall in 50 minutes (calculated as in excess of a 50-year storm), the road and culvert were washed out. Gates Mills reconstructed the culvert to its original specifications, notwithstanding that the street commissioner and building inspector of the village, who was in charge of such reconstruction, testified on cross-examination that he knew at the time that the culvert was inadequate.

The cause is before this Court on appeals as of right and pursuant to the allowance of motions to certify the record.

GIBSON, J. The first issue for decision is the extent of liability, if any, which the defendants may have incurred by reason of installing the 72-inch storm sewer for collecting the additional surface water run off in the Deer Creek watershed and causing it to flow upon lower lands. Although an upper-land owner cannot lawfully increase the burden on lower lands by collecting surface water and discharging it directly on such lands in larger quantities or at points other than those established by natural drainage, it is well settled that he can, without incurring liability, channel his surface water into a watercourse passing through his land, thus increasing the volume and accelerating the flow of water in the watercourse. *Mason v. Commissioners of Fulton County* (1909), 80 Ohio St., 151; *City of Hamilton v. Ashbrook* (1900), 62 Ohio St., 511; *Spicer v. White Bros. Builders, Inc.* (1962), 118 Ohio App., 11; *Sullivan v. Board of Commissioners of Lorain County*

(1960), 111 Ohio App., 281; *Bey v. Wright Place, Inc.* (1956), 108 Ohio App., 10; *Ratcliffe v. Indian Hill Acres, Inc.* (1952), 93 Ohio App., 231; *Nagy v. City of Akron* (1927), 27 Ohio App., 250; *Aubele v. A. B. Galetovich, Inc.* (1960), 83 Ohio Law Abs., 200; *Oakwood Club v. South Euclid* (1960), 83 Ohio Law Abs., 153; *Spielberger v. Twelfth Dayton Builders Corp.*, 76 Ohio Law Abs., 12; *Persin v. Youngstown* (1949), 57 Ohio Law Abs., 560; *Pontifical College v. Kleeli* (1907), 5 N. P. (N. S.), 241, 18 O. D., 703; *Dill v. Oglesbee*, 5 N. P., 271, 8 O. D., 224; *Kemper v. Widows' Home* (1881), 6 Dec. Rep., 1049; 55 Ohio Jurisprudence (2d), 232, Waters and Watercourses, Section 54; Callahan, Principles of Water Rights Law in Ohio (1959), 18, Section 47. A municipality enjoys the rights of an upper-land owner in this respect. *City of Hamilton v. Ashbrook, supra; Springfield v. Spence* (1883), 39 Ohio St., 665; *Oakwood Club v. South Euclid, supra; Nagy v. City of Akron, supra.* The court in *Nagy*, however, held that a municipality may not without liability collect surface water in a storm sewer and empty it into a watercourse which does not enter, pass through, or border on the corporate limits of such municipality. There is no question that Deer Creek, which flows through Mayfield Heights, meets the requirements of a natural watercourse for the drainage of the Deer Creek watershed. It would appear that the plaintiffs never have had a right to enjoin the defendants, or any of them, from collecting surface water within the Deer Creek watershed and causing such water to be drained into Deer Creek within the city of Mayfield Heights.

Defendants assert a right to drain surface water from the portions of the Wilson Mills and Andrews Creek watersheds lying generally south of Mayfield Road into Deer Creek, by reason of the open and adverse diversion of such

water for 36 years, which period is well in excess of the prescriptive period of 21 years. The plaintiffs, however, contend (1) that a prescriptive right was not acquired by the defendants because the 1925 sewer system did not discharge water into Deer Creek in sufficient quantities to cause damage to properties of lower-land owners or to increase the burden of Gates Mills in the maintenance of its streets and bridges until the installation of the sewer under Eastgate shopping center in 1955, and, hence, a claim of adverse possession prior to 1955, could not have been entailed, and (2) that, even if a prescriptive right was gained, it was limited by the amount of such water drained through the 1925 tile and cannot be increased by the water which will be drained by the 72-inch tile.

With respect to plaintiffs' first argument, even if it be assumed that the 1925 sewer system did not discharge water into Deer Creek in sufficient quantities to cause damage to the properties of the lower-land owners, we do not believe that damage is the critical issue. See *McCoy v. Rankin* (1941), 35 Ohio Law Abs., 621; 93 Corpus Juris Secundum, 827, Waters, Section 127. But rather it is the diversion of surface waters from one or more watersheds into another, which is the unlawful act. See Sections 3767.13 and 3767.17, Revised Code. Clearly, in this case, the diversion from the Wilson Mills and Andrews Creek watersheds has been continuous, uninterrupted, adverse and exclusive under a claim of right for more than the prescriptive period of 21 years. The act of diversion being the unlawful act, the cause of action accrued at the moment the diverted waters were first discharged into Deer Creek. Any action for compensation for property taken without consent must be brought within the prescriptive period of 21 years. 19 Ohio Jurisprudence (2d), 715, Eminent Domain, Section 296.

The parties argue extensively various aspects of the question whether the diversion was sufficiently "open and notorious" for the raising of a prescriptive right to continue to divert the surface water of the two foreign watersheds. True, a prescriptive right cannot be acquired by secret trespass, but it is not necessary that the adverse user be actually known. Here, the sewer under Mayfield Road was literally open at its point of entrance into Deer Creek. There was nothing secret about the installation of that sewer in 1925. On the contrary, all the plans, specifications, expenditures, times of construction, and uses of intercepting sewers were matters of public record, available to everyone including the plaintiffs. Regardless of whether the plaintiffs or their predecessors in office and title fully appreciated that the sewer drained foreign watersheds, we believe that the drainage through the 1925 sewer has been of such "open and notorious" character as to charge the plaintiffs with knowledge of the function served by the sewer. To impose any other standard would make it impossible to acquire a prescriptive right to drain any foreign watershed.

Plaintiffs' second argument goes to the extent of the drainage right which the defendants acquired by prescription. This argument assumes that the prescriptive right acquired is limited to carrying and discharging only a certain quantity of water in sewers that are no longer adequate to meet public needs. However, the prescriptive right acquired by defendants is one to drain a particular area rather than to drain a given quantity or volume of water. Area appears to be the best standard by which the right acquired may be defined. The quantity or volume of water drained at any time is variable, subject to many inconstant factors, such as rainfall intensity, soil saturation,

perviousness of surface, and runoff characteristics. The only constant factor is the area drained.

Having acquired the right to drain certain areas of the two foreign watersheds, the defendants, as well as the inhabitants of those areas, have the right to make reasonable use of the land and to develop the same, even though the runoff of surface water may be increased and the flow of water in the sewer system may be accelerated at the point of discharge into Deer Creek. These rights would appear to be no different from those previously described concerning the use and development of lands in the Deer Creek watershed. In short, there being the right to divert the surface water from a watershed, such right extends to a diversion of all water that might run off as a result of the land being developed and put to reasonable use.

The foregoing rule would appear to be necessary if the law is to foster economic growth and development rather than to inhibit such development. Such a rule imposes no undue burden on a lower-property owner, who must be held to expect, when he acquires lands through which a natural watercourse flows, that the dominant landowners will develop their lands to their most beneficial uses and, in the promotion of those uses, will collect surface water and accelerate the flow thereof into its natural watercourses. That a lower-property owner's right to water could be adversely affected by the growth of municipalities and the reasonable development of beneficial land uses was recognized by this Court long ago in *City of Canton v. Shock* (1902), 66 Ohio St., 19. It must be presumed that lower-land owners purchased their lands aware of this contingency, since community growth and land development are inevitable.

It should be noted that, if the right to discharge surface water diverted from the foreign watersheds into Deer

Creek had been acquired in 1925 by condemnation proceedings, the damages would have been fixed for all time, notwithstanding the impossibility of ascertaining at that time precisely the extent of the increased volume and accelerated flow of surface runoff water which would be drained in the future. Were this not so, a separate action would be required every time a construction occurred in the drained portion of the foreign watershed, *e.g.*, the paving of a street, the building of a shopping center or the erection of a home. This, of course, would be an intolerable burden in a burgeoning urban economy.

In addition to the foregoing reasons for affirming the judgment of the Court of Appeals, plaintiffs clearly were guilty of laches in seeking to enjoin the completion of the 72-inch sewer here in question. The officials and residents of Gates Mills, who are the plaintiffs in this action, had been aware of the proposed construction of the new freeway and interchange in Mayfield Heights before the construction began and for over two year prior to the commencement of this action. They also were aware that there would be drainage problems involved in a construction of this type and magnitude. A large portion of the more than $800,000 in public funds invested in this sewer had been spent when this action was commenced.

For the reasons stated above, we find it unnecessary to consider the other assignments of error made by the plaintiff-appellants.

Judgments affirmed.

ZIMMERMAN, MATTHIAS, GRIFFITH and HERBERT, JJ., concur.

TAFT, C. J., and O'NEILL, J., concur in paragraphs one, two and three of the syllabus but dissent from paragraph four thereof and from the judgment.

O'NEILL, J., dissenting. I concur in paragraphs one, two and three of the syllabus but dissent from paragraph four of the syllabus and from the judgment.

Even though an injunction can not be granted against the construction of the sewer for the reason that it has been completed, an injunction against the expanded use of the plaintiffs' property could be granted until compensation has been paid for such expanded use, or the prayer of the petition for general relief is sufficiently broad to justify an award of damages.

TAFT, C. J., concurs in the foregoing dissenting opinion.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(Entered March 4, 1964.)

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellants their costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.